United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-7644

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

BUILD OF BUFFALO, INC., NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, Buffalo Branch, BLACK EDUCATORS ASSOCIATION FOR THE NIAGARA FRONTIER, INC., WILLIAM C. BRYANT, SHIRLEY L. HARRINGTON, CLARA M. DAVIS, JEWELL B. McDOWELL, DIANE MEDLEY, LELIA F. BYRD, Individually and on behalf of all others similarly situated,

Plaintiffs-Appellants

- vs -

BOARD OF EDUCATION OF THE CITY OF BUFFALO, N.Y., MALCOLM WILSON, Governor of the State of N.Y., et al.,

Defendants-Appellees

B

SECOND CIRCUIT DOCKET NO. 75-7644 and 75-7660

P/S

- -

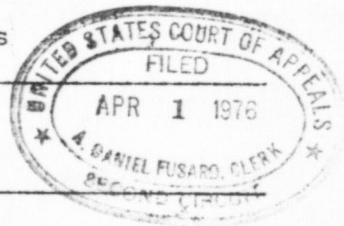
BUILD OF BUFFALO, INC., HELENE P. SNELL, MARY M. HALL, SHERYL BURCH, ELLA QUINN, DONNEE C. HILL, JEANETTE SHROPSHIRE & ELDA McKINNON, Individually and on behalf of all others similarly situated,

Plaintiffs-Appellants

- vs -

BOARD OF EDUCATION OF THE CITY OF BUFFALO, N.Y., EUGENE T. REVILLE, Supt. of Schools, City of Buffalo, et al.,

Defendants-Appellees



MEMORANDUM OF LAW
ON BEHALF OF DEFENDANTS-APPELLEES

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TABLE OF CONTENTS

STATEMENT OF FACTS

The plaintiffs herein filed the first above named civil action on December 5, 1974 in the United States District Court for the Western District of New York; essentially similar plaintiffs filed the second above entitled civil action on October 16, 1975 in the United States District Court for the Western District of New York.

Thereafter, proceedings were had before the Hon. John T. Curtin, United States District Court Judge for the Western District of New York. As appears from the title in the first above named proceeding, the State of New York and various officials thereof were joined as parties defendant. By an order dated July 14, 1975 the Court directed that the State defendants be dropped from this proceeding. The Court directed that the above entitled actions be consolidated pursuant to Federal Rule of Civil Procedure 42-A. By orders dated November 3 and November 6, 1975 plaintiffs' motion for a preliminary injunction was denied and the Court refused to certify the action as a class action and also refused the request to impanel a three-judge District Court. From these last orders, plaintiffs have appealed.

STATUTE INVOLVED

Section 2573, Subd. 10-a of the Education Law of New York reads in part as follows:

> "In a city having a population of four hundred thousand and less than one million it shall be the duty of the superintendent of schools, at the direction of the board of education, to hold examinations whenever necessary, to examine all applicants who are required to have their names placed upon eligible lists for appointment in the schools of such cities and to prepare all necessary eligible lists. Eligible lists shall not be merged and one eligible list shall be exhausted before nominations are made from a list of subsequent date. No eligible list shall remain in force for a longer period than three years. Recommendations for appointment to the instructional service, except for the position of superintendent of schools, associate superintendent, assistant superintendent, director, supervisor, principal, head of department, executive assistant to the superintendent, or any other office or position of the rank of supervisor or above, shall be from the first three persons on an appropriate eligible list so prepared."

Section 2573, Subd. 10 makes similar provisions for cities with populations in excess of one million.

LAW

ISSUES

1. The District Court did not err in failing to convene a three-judge district court.

2. The District Court did not err in refusing to certify these proceedings as a class action.

3. The District Court did not err in refusing plaintiffs' motion for a preliminary injunction.

POINT I

THE DISTRICT COURT DID NOT ERR IN FAILING TO CONVENE A THREE-JUDGE DISTRICT COURT.

Plaintiffs contend in their brief that United States District Court Judge John T. Curtin erred in refusing to convene a three-judge district court because the statute is "general" by its terms and because a preliminary injunction is sought, plaintiffs' brief at pages 9 and 10. Plaintiff cites various New York State cases dealing with home rule problems and the terms "general", "special" and "local" as words of art used in that particular field of municipal law.

28 U.S.C. 2281 is not "[a] measure of broad social policy to be construed with great liberality", but "[a]n enactment technical in its terms, to be applied as such." Phillips v. United States, 312 U.S. 246, 250, 61 S. Ct. 480, 55 L. Ed. 800 (1941) (Frankfurter J.). See also Allen v. State Board of Elections, 393 U.S. 544, 22 L. Ed. 2d 1, 89 S. Ct. 817 (1969). Judicial economy calls for a strict construction of this statute, and a primary criteria has always been whether the action taken pursuant to the state statute in fact affects only a particular region or district within the state. Phillips, supra, at 251, 61 S. Ct. at 483; Board of Regents v. New Left Education Project, 404 U.S. 541, 92 S. Ct. 652, 30 L. Ed. 2d 697 (1972); Moody v. Flowers, 387 U.S. 97, 87 S. Ct. 1544, 18 L. Ed. 2d 643 (1967); Rorick v. Board of Commissioners, 307 U.S. 208, 595 S. Ct. 808, 83 L. Ed. 1242 (1937).

In Ex Parte Public National Bank of New York, 278 U.S. 101, 73 L. Ed. 202, 49 S. Ct. 43 (1928) the Supreme Court refused to require a three-judge district court where a New York State statute imposed state-wide taxes assessed "by, and for the sole use of the City" of New York.

Two recent decisions on this matter in other circuits indicate that § 2573, Subd. 10-a of the New York Education Law is not a statute of state-wide or more than local import by standards applicable to this proceeding.

The Eighth Circuit Court of Appeals ruled in Dove v. Bumpers, 497 F. 2d 895 (C.A. 8, 1975), that an Arkansas state statute requiring that aldermen be elected at large in cities of the first class which have a population of 50,000 or more, and also have a mayor-council form of government, was local in nature because in effect it applied to only two cities in the State.

In the Seventh Circuit the Court of Appeals upheld a refusal to convene a three-judge district court where an Urban Renewal Consolidation Act was in question, since the act applied only to cities "[w]ith more than 500,000 inhabitants." Blankner v. City of Chicago, 504 F. 2d 1037, 1043 (C.A. 7, 1974).

The impanelling of a three-judge district court in this case, in light of the disfavor of such actions in general, and the effect of the statute only upon a particular region of

the State, would have been improper and Judge Curtin did not err in refusing to impanel that court.

POINT II

THE DISTRICT COURT DID NOT ERR IN REFUSING TO CERTIFY THESE PROCEEDINGS AS A CLASS ACTION.

Plaintiff makes the assertion that the invocation of 42 U.S.C. 2000(e) makes a suit ipso facto a class action, and that alternatively, the trial court only has discretion to determine whether the app opriate criteria of F.R.C.P. 23(a) and (b) 2 are met.

A. The invocation of 42 U.S.C. 2000(e) et. seq. is not enough to require that a suit be certified a class action.

Plaintiff contends that the invocation of 42 U.S.C. 2000(e) et. seq. is sufficient in and of itself to require certification of the suit as a class action. At no point in the advisory committee's Note following the 1966 Amendment to Rule 23 F.R.C.P. does any indication appear in support of this contention. 39 F.R.D. 69, 98-106.

Indeed the Ninth Circuit has looked into Title VII and has pointed out that:

> "When the provisions of Title VII authorizing the court to waive costs and fees and to grant attorneys fees, indicate that Congress intended to ease the way of the Title VII plaintiff, the same provision also indicates that when Congress intended to grant special privileges or to waive the usual procedural rules it knew how to say so." Gregory v. Litton Systems, 472 F. 2d 631 (9th Cir. 1972)

In an even more recent case, Hoston v. Gypsum Co., 67 F.R.D. 650 (D.C. La. 1975) it was held that "[t]he mere fact that plaintiff alleges a violation of Title VII does not make his suit ipso facto a class action." See also Gresham v. Ford Motor Co., 53 F.R.D. 105, 106-107 (N.D. Ga. 1970); Mason v. Calgon Corp., 63 F.R.D. 98 (Pa. 1974).

Plaintiffs' assertion that Title VII cases in many instances lend themselves to class action treatment under 23(b) 2 criteria is correct. However, no legal support is given for a doctrine of knee-jerk certification of the class regardless of its propriety, merely because of the invocation f Title VII, nor has this Circuit adhered to such an approach.

Vulcan Society v. Civil Service Commission, 490 F. 2d 387, 400 (2nd Cir. 1973).

B. The trial judge may refuse to certify a class where the relief sought by individual plaintiffs in the matter will adhere to the benefit of all others similarly situated.

In Galvan v. Levine, 490 F. 2d 1255 (2nd Cir. 1973), cert. denied 417 U.S. 936, 94 S. Ct. 2652, 41 L. Ed. 2d 240 (1974), the court held that where judgment runs not only to the benefit of named plaintiffs but also to the benefit of all others similarly situated, that the class need not be certified by the trial judge. See also Vulcan Society v. Civil Service Commission, 490 F. 2d 387, 399 (2nd Cir.), aff'g in part 360 F. Supp. 1265, 1266-67 N. 1 (S.D.N.Y. 1973); Tyson v. New York City Housing Authority, 369 F. Supp. 513, 516 (D.C.N.Y. 1974).

Plaintiff relies on a 1968 Fifth Circuit case for the theory that all that plaintiff need show for certification as a matter of right is the meeting of the criteria of F.R.C.P. 23 (a) and (b) (2). Admittedly such a showing is the sine qua

non of class certification, but totally apart from the question of whether the plaintiffs have met the requirements of Rule 23 (a) and (b) for maintaining a class action, in a recent trend of cases outside of this circuit [Ihrke v. Northern States Power Co., 459 F. 2d 566, (8th Cir. 1972) vacated as moot 409 U.S. 815, 93 S. Ct. 66, 34 L.Ed. 2d 72; Martinez v. Richardson, 472 F. 2d 1121 (10th Cir. 1973); Edwards v. Schlesinger, 377 F. Supp. 1091 (D.C.D.C. 1974); Coffin v. Sec. of HEW, 400 F. Supp. 953 (D.C.D.C. 1975)] applications for class actions have been denied when the declaratory and injunctive relief being sought can be shaped to have the same purpose and effect as a class action.

Plaintiffs at no point dispute the fact that denial of class action status will have no effect on the full remedy that would be accorded plaintiffs and others similarly situated, should plaintiffs prevail.

One would be hard pressed to find discriminatory testing should § 2573, Subd. 10(a) be found unconstitutional, nor could one suppose that a properly validated examination for the named plaintiffs would be discriminatory for any other

person similarly situated.

POINT III

THE DISTRICT COURT DID NOT ERR IN REFUSING PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION.

A. Plaintiffs failed to establish any possibility of success on the merits, in that a prima facie case of racial discrimination in the testing procedures utilized by the Buffalo Board of Education was not established.

Plaintiffs introduced no relevant evidence that minority candidates who have taken the test administered pursuant to § 2573, Subd. 10(a) of the New York Education Law, pass that examination with less frequency than white candidates. A statistical showing that white candidates passed the examination in question at a significantly disproportionate rate to minority candidates is a major factor in the establishing of any basis for the continuance of the suit, let alone the granting of injunctive relief. Bridgeport Guardians, Inc. v. Bridgeport Civil Service Commission, 482 F. 2d 1333 (C.A. 2, 1973); Chance v. Board of Examiners, 458 F. 2d 1167 (C.A. 2, 1972).

Plaintiff does not offer any other relevant data justifying its claim of discrimination in testing procedures than a comparison of ethnic/mix (teachers) to ethnic/mix (community). This showing of racial discrepancy between the percentage of minorities in the community at large, when candidates are culled from the community at large, and the percentage of minorities in the job classification has some probative value, but, by itself does not establish a prima facie case. Castro v. Beecher, 334 F. Supp. 930, 935-36 (D. Mass. 1971), modified 459 F. 2d 725 (C.A. 1, 1972). In our case, candidates are culled not from the community at large, but from a group of individuals who have already been through the considerable screening processes of a college education and state certification. It is respectfully submitted that the plaintiffs in this case made no showing that these preliminary procedures, having nothing to do with testing requirements, did not produce the "discriminatory aspect" alleged.

With such dubious and scanty documentation before him, Judge Curtin could hardly be said to have abused his

discretion in a determination that plaintiffs had not met the heavy burder of proof which they must meet in requesting the extraordinary relief of a preliminary injunction. Pride v. Community School Board, 482 F. 2d 257, 264 (C.A. 2, 1973).

Courts generally will not grant a preliminary injunction if plaintiffs thereby would receive "the full measure of relief to which normally they would be entitled only after trial on the merits and then only if they sustained the burden of their claims."

Blaich v. National Football League, 212 F. Supp. 319, S.D.N.Y. 1962.

Also see Fanning v. United Scenic Artists, Local 829 etc., 265 F. Supp. 523, S.D.N.Y. 1966.

Plaintiffs further contend that, because certain courts have found certain portions of the test administered by the Board of Education discriminatory as used in those jurisdiction, and for various purposes, that the use of these portions of the test taints the entire test, and invalidates the test. Accepting arguendo that the NTE is discriminatory as applied in Western New York, for the initial hiring of teachers, this by itself would not taint the entire test.

> "That blacks fare less well than whites on the AGCT, a 'subtest' in the hiring of East Cleveland police officers, is insufficient in itself to require defendants to justify the AGCT as being job related. Carried to its logical extreme such a criterion would require the elimination of individual questions, marked by poorer performance by a racial group on the ground that such a question was a 'subtest of a subtest'."
>
> Smith v. Traynor, 528 F. 2d 492, 498 (C.A. 6, 1975)
>
> "Any...approach [other than scrutinizing the overall examination procedure] conflicts with the dictates of common sense. Achieving at least a passing score on the examination in its entirety determines eligibility for appointment, regardless of performance on individual subtests."
>
> Kirkland v. N.Y. State Dept. of Corrections, 374 F. Supp. 1361, 1370 (S.D.N.Y., 1974)

Plainly appellants show little if any probability of success on the merits of their claim of discriminatory testing procedures.

B. Plaintiffs showed no chance of success on the merits of their claim that § 2573 (10-a) of the New York State Education Law lacks a rational basis or is arbitrary and capricious.

Probability of success on the merits in such an equal protection claim of arbitrariness, as appellants allege, calls for considerable proof. Any "[d]istinction in legislation is not arbitrary, if any state of facts reasonably can be conceived that would sustain it" (N.Y. Rapid Transit v. City of New York, 303 U.S. 573, 578; 82 L. Ed. 1024, 1030; 58 S. Ct. 721) and the state is permitted considerable latitude in distributing its resources and administering its law (Smith v. Folette, 445 F. 2d 955, 959 [C.A. 2, 1971]). Appellants contend that a requirement that the two largest cities in the State of New York engage in competitive testing lacks a rational basis. No mention is made in appellants' brief of problems peculiar to the larger cities, of the number of candidates applying for positions in these two cities as compared with other, smaller, localities which do not require testing. No mention is made of the interests various municipalities have in decentralized control of their school systems, nor of the inherent abuses of subjective hiring policies in the large urban area. The legislative schema of § 2573 (10) and (10-a) of the Education Law is readily apparent as an application of the New York State

Constitutional requisite for competitive testing "according to merit and fitness to be ascertained, as far as practicable, by examination, which, as far as practicable, shall be competitive." (Art. V, Sec. 6)

One of the arguments advanced by the plaintiffs to justify the granting of a preliminary injunction is the contention that Section 35(g) of the Civil Service Law of New York, by providing that all persons who are members of a teaching staff of a school district shall be in the unclassified service, has precluded the conducting of any examination for such individuals. In the case of Carow v. The Board of Education of the City of New York, 272 N.Y. 341, the Court of Appeals discussed the New York State Constitutional requirement for testing applicants for positions in the civil service according to "merit and fitness", as well as statutory requirements on the subject.

In the Carow case, the Court of Appeals stated:

> "Nonetheless, even after the division of the civil service "into the unclassified service and the classified service," both divisions were still part of the "civil service" in which the Constitution (Article V, Section 6) commanded

> that appointments and promotions shall be made according to "merit and fitness to be ascertained, so far as practicable, by examinations, which, so far as practicable, shall be competitive..."
>
> "In this case we are dealing with appointments in public schools in the city of New York. Though such positions are in the unclassified service, the Legislature has provided in the Education Law (now Section 2573, Subdivision 10) that appointments shall be made after competitive examination conducted by the Board of Examiners of the Board of Education. That is a legislative determination that it is practicable to ascertain merit and fitness by competitive examination, and such determination conforms to the command of the Constitution, no less than if made by placing the position in the classified service."

This case has not been reversed or in any way modified. However, in Matter of Andresen v. Rice, 277 N.Y. 271, this same Court, by citing Carow, confirmed its previous holding that placing a position in the unclassified civil service does not answer the requirements of Article V, Section 6 of the New York Constitution where it is practicable to test for "merit and fitness" by competitive examination.

The fact of the matter is that the City of Buffalo must engage in some selection process because of the great number of applicants for positions in Buffalo Schools, and that competitive testing is designed "[t]o do away with abuses, real or

supposed, arising from appointment and promotion of teachers on a basis of social and religious favoritism and of political patronage, and to place appointment...of teachers purely on a competitive basis." Chance, supra at 1170.

C. The balance of hardships does not tip sharply in the plaintiffs' favor.

Plaintiffs assert the theory that although there be no showing of a chance of success on the merits, nor even a showing of a prima facie case, that the preliminary injunction should nevertheless be granted because of the "lack of hardship" accruing to the Board of Education by its being granted.

If granted, the preliminary injunction would seriously intrude upon the operation of a school system in which clearly the local, rather than the federal, authorities have responsibility. Epperson v. Arkansas, 393 U.S. 97, 104; 89 S. Ct. 266; 21 L. Ed. 2d 228 (1968).

Plaintiffs in their brief contend at pages 19 and 20:

> "The defendants will not suffer any significant harm by the grant of the preliminary injunction, since there has already been established a system of appointing substitute and temporary teachers to positions with the same responsibility as that held by permanent and probationary teachers."

> "The differentiating factors rest upon salary, fringe benefits, and status, rather than responsibility or performance."

Plaintiffs obviously cannot distinguish the trees for the forest.

Aside from the substantial interest of the Board of Education in the proper administration of its affairs and the provision of the most competent corps of teachers through the utilization of proper testing procedures, and its bona fide interest in protecting its integrity, specific individuals will be harmed just as irreparably by the granting of the preliminary injunction as would any plaintiff be by its denial. These are the individuals presently on the permanent teachers eligibility list.

Salary, fringe benefits and status are matters of considerable interest to these individuals. The person on the permanent list is not necessarily on the substitute list, nor is he willing in all cases to accept a temporary appointment. Should the present list expire during the injunctive period, the individuals awaiting appointment could very well lose forever the chance of appointments. The fact that the City of Buffalo goes on without them is going to be a matter of minimal solace to the individual awaiting appointment.

> "We are dealing here not with abstractions but with people, some of whom have worked diligently for years to pass the... examination and rise to a more responsible job."

Chance, supra, at page 1178.

As was so aptly put in Kirkland v. New York State Dept. of Correction, 374 F. Supp. 1361, 1366 (S.D.N.Y.):

> "The competing interests are vital to the named parties, to other individuals who may be affected by the outcome and to the public at large. Plaintiffs strive to insure for themselves and the minorities they seek to represent the fair treatment in the public employment sphere which the Constitution guarantees.
>
> Their efforts bring them into conflict with those individuals who passed the challenged examination and have a vested interest in securing the promotions which are rightfully theirs if the examination is upheld."

CONCLUSION

Considering the harm that will of necessity be done to the Board of Education, the city schools, and individuals awaiting appointment, the ruling of Judge Curtin denying

injunctive relief was not an abuse of his considerable discretion in this matter.

Respectfully submitted,

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STATE OF NEW YORK)
COUNTY OF ERIE) ss.:
CITY OF BUFFALO)

KAREN R. FALZONE, being duly sworn, deposes and says that she is over 18 years of age and not a party to this action, and that she is a Legal Stenographer in the Law Department of the City of Buffalo; that on the 10th day of

March, 1976, deponent served copies of Appellees' Brief upon:

Barbara M. Sims, Esq.
Attorney-at-Law
340 Statler Hilton
Buffalo, New York 14202

in this action, at the above address designated by said attorney for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

Karen R. Falzone
KAREN R. FALZONE

Subscribed and sworn to before me
this 8th day of April, 1976.

Teresa L. Sidwell
Commissioner of Deeds
Buffalo, New York
My commission expires 12/31/76.

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STATE OF NEW YORK
COURT : COUNTY OF Index No.

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SECOND CIRCUIT
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and
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ORIGINAL

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(716) 852-6650

TO: _____

PLEASE TAKE NOTICE that an , *of which the within is a copy, was duly granted in the within-action on the* *day of* , *19* , *and duly entered in the office of the Clerk of the County of on the* *day of* , *19* .

Yours, etc.
LESLIE G. FOSCHIO
Corporation Counsel
Attorney for

DUE AND PERSONAL SERVICE of the within paper(s) and of the Notice hereon endorsed is admitted this *day of* , *19* .

Attorney(s) for